

² See K.S.A. 1996 Supp. 44-510d and K.S.A. 1998 Supp. 44-510d.

that the date of accident for the left upper extremity is August 1996, and the date of accident for the right upper extremity is September 1998.³

In the July 14, 2000 Award, Judge Clark found claimant sustained an unscheduled injury and awarded claimant a 19 percent permanent partial general disability. The Judge found that claimant injured his right shoulder as the direct and natural consequence of the left shoulder injury. Persuaded by the medical report provided by Dr. Philip R. Mills, whom the Judge appointed to perform an independent medical evaluation, the Judge found claimant had a 16 percent functional impairment to the left upper extremity and a 17 percent functional impairment to the right upper extremity, which convert to a 19 percent whole body functional impairment.

Respondent and its insurance carrier contend Judge Clark erred. They argue Dr. Mills' report should not be considered as part of the record as the doctor did not testify.⁴ They also argue claimant should receive benefits for two scheduled injuries instead of benefits for one unscheduled injury. Therefore, respondent and its insurance carrier request the Board to modify the Award to grant claimant benefits for a four percent permanent partial disability to the left upper extremity and benefits for a four and one-half percent permanent partial disability to the right upper extremity.

Conversely, claimant requests the Board to affirm the Award. Claimant argues he injured his right shoulder by favoring and guarding the injured left shoulder.

The only issues before the Board on this appeal are:

1. Did claimant's right shoulder injury occur as a direct and natural consequence of the work-related left shoulder injury, making this an unscheduled injury?
2. Is Dr. Mills' medical report part of the evidentiary record?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. Claimant has worked for respondent for more than 30 years. For approximately 26 years, claimant's job was to lift and move steel parts from a conveyor to a skid. Claimant,

³ See the Stipulation Regarding Potential Accident Date filed June 21, 2000, with the Division of Workers Compensation.

⁴ Respondent and its insurance carrier also argue that Dr. Mills' functional impairment rating cannot be considered as required by K.S.A. 1996 Supp. 44-510e (the "unscheduled injury" statute) as they contend this claim deals with two scheduled injuries instead of an unscheduled injury.

on a daily basis, repetitively lifted approximately 40 pounds, moving 8,000 parts a day, 10 parts at a time.

2. In October 1996, claimant reported upper extremity problems to respondent. At that time, claimant's main problems were a left trigger finger and his left shoulder, which was catching and shooting sharp pains down into his arm. Respondent then referred claimant to Dr. James L. Gluck for treatment.

3. According to claimant, when he first saw Dr. Gluck, he advised the doctor that his left shoulder was catching and snapping and sending sharp pains down into his arm and that his right shoulder also hurt when lifting. Claimant testified the doctor responded by stating that they would first treat the left shoulder, because it was worse than the right, and then they would treat the right shoulder. As part of the treatment regimen, Dr. Gluck prescribed physical therapy. Claimant's testimony is uncontradicted that he told his physical therapist that he was having dull pain in his right shoulder but that his left shoulder was much worse. Claimant testified, in part:

I told her [the therapist] that my left one [shoulder] was catching and sending sharp pains down my arm, through my elbow, and my right one was just dull pain -- pain and -- and only hurt when I went to -- if I left it in one position for a long period of time and moved it, it would hurt, and trying to lift stuff, but that my left one was worse than my right one.⁵

4. According to Dr. Gluck, who first saw claimant on October 30, 1996, claimant's initial complaints were to his left middle finger and his left arm only. The doctor does not recall and, according to the doctor, his notes do not reflect that claimant also initially complained about his right shoulder.

5. In June 1997, Dr. Gluck operated on claimant's left shoulder, removing the bursa and performing a subacromial decompression. The doctor also operated on claimant's left middle finger. In December 1997, the doctor released claimant from care and rated his left upper extremity at four percent, which was allegedly pursuant to the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment (Guides)*.

6. Having complaints of left elbow pain, left palm pain, and left shoulder soreness, claimant returned to Dr. Gluck in late January 1998.

7. By September 1998, claimant's right shoulder had worsened and he reported that problem to respondent's occupational nurse. Claimant then returned to Dr. Gluck, who had not seen claimant since January 1998. Claimant advised Dr. Gluck that he now had right

⁵ Regular Hearing, April 17, 2000; pp. 30, 31.

shoulder symptoms, which had allegedly begun several months before and which claimant attributed to using his right arm more because of the ongoing symptoms in his left upper extremity.

8. Dr. Gluck diagnosed a right shoulder impingement, which was similar to the left shoulder injury, and began treatment. On December 18, 1998, the doctor operated on claimant's right shoulder. By April 1999, the doctor determined that claimant's right shoulder had reached maximum medical improvement and the doctor rated claimant's right shoulder at three percent. The doctor released claimant without any specific restrictions except to limit reaching and overhead work according to his pain.

9. When asked if the right upper extremity problems would have developed without the earlier left upper extremity injury, the doctor testified that he had no opinion.

10. According to Dr. Gluck, both the left shoulder and right shoulder injuries were caused by overuse.

11. In February 1998, claimant filed an Application for Hearing with the Division of Workers Compensation, which alleged only left shoulder and left middle finger injuries. In October 1998, claimant filed an amended Application for Hearing that alleged bilateral upper extremity injuries. The amended application noted:

Briefly state nature and extent of injuries claimed: cumulative trauma disorder – BILATERAL – both upper Extremities – since surgical treatment, this disorder has spread to the RIGHT upper extremity due to the claimant favoring the right extremity due to guarding of the left[.]

12. During litigation of the claim, Judge Clark ordered an independent medical evaluation by Dr. Philip R. Mills. According to the doctor's letterhead, Dr. Mills is board certified in physical medicine, among other specialties, and is a board certified independent medical examiner.

13. Dr. Mills examined claimant in January 2000 and wrote the Judge on January 27, 2000. According to that letter, the doctor diagnosed (1) left middle finger/trigger finger with tenosynovitis, now resolved, (2) bilateral shoulder impingement syndrome with subacromial bursitis, (3) left anterior/superior labral tear, (4) left acromioplasty with bursectomy, and (5) right acromioplasty with CA ligament release. Using the fourth edition of the *AMA Guides*, Dr. Mills rated claimant as having a 16 percent functional impairment to the left upper extremity and a 17 percent functional impairment to the right upper extremity, which convert to a 19 percent whole body functional impairment. The doctor's only comment regarding causation indicated that claimant's problems appeared related to his work.

14. Claimant presented the deposition testimony of Dr. Jane Drazek, who examined claimant at his attorney's request. Dr. Drazek first examined claimant in July 1998. At that

time, the doctor believed claimant had a 17 percent permanent functional impairment to the left shoulder but none in the right shoulder. In June 1999, the doctor examined claimant a second time and determined that claimant had a six percent functional impairment to the right shoulder. According to the doctor, claimant's grip strength was better at the June 1999 examination and, therefore, the functional impairment rating for the left upper extremity would now be lower than the 17 percent that she found in July 1998.

15. Based upon her examinations and review of claimant's medical records, Dr. Drazek believes that claimant sustained cumulative injuries and traumas to his upper extremities that may have preceded the onset of symptoms. The doctor also testified that claimant probably developed overuse of the right shoulder from compensating for the injured left shoulder. The doctor testified, in part:

The record does indicate that he [claimant] had reached a point of maximum medical improvement sometime before -- on the left sometime before the onset of symptoms on the right, but in my opinion that does not mean that his left shoulder was fine. He still complained of pain. He still had weakness. He still, by his history, was compensating with the contralateral shoulder, the right shoulder. So it's my impression that he was tending to use the right side more than he would normally do on the basis of pain, on the basis of range of motion restrictions, and on the basis of some mild shoulder weakness. And I think that the likelihood is that he developed overuse on the left side, at least -- I'm sorry -- on the right side at least, in part, based on compensation for limited use on the left side.⁶

Dr. Drazek's testimony is consistent with her June 28, 1999 medical report in which she wrote:

It is my impression that it is more likely than not that the right shoulder symptoms are secondary to overuse of the right upper extremity, most likely on the basis of inability to use the left upper extremity following the onset of impingement syndrome. . . .

16. Based upon claimant's testimony and the various medical opinions, the Board finds that it is more probably true than not that claimant's right shoulder injury is the direct and natural consequence of the left shoulder injury. The Board also concludes that it is more probably true than not that claimant sustained simultaneous cumulative traumas to both shoulders before either shoulder became symptomatic.

17. The Board agrees with the Judge's finding that claimant sustained a 19 percent whole body functional impairment as a result of the bilateral shoulder injuries.

⁶ Deposition of Jane Drazek, M.D., October 7, 1999; pp. 25, 26.

CONCLUSIONS OF LAW

1. The Award should be affirmed.
2. Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,⁷ the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1.)

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*,⁸ the Court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. **The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury**, but not when the increased disability resulted from a new and separate accident. (Emphasis added.)

3. When considering the entire record, the Board concludes that claimant's injuries should be compensated as an unscheduled injury rather than as two scheduled injuries. First, the Board concludes the right shoulder symptoms and condition gradually increased and developed as the natural and direct consequence of compensating for the left shoulder injury.

Second, over the 26-year period that claimant repetitively lifted parts weighing approximately 40 pounds, claimant sustained simultaneous trauma to both shoulders. When a worker's upper extremities are simultaneously injured, the injury is compensable as one injury to the body rather than two scheduled injuries. That is true even in those situations such as *Depew*,⁹ where the symptoms in the left upper extremity began months after claimant began having right upper extremity symptoms and after claimant underwent right upper extremity surgery.

⁷ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁸ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973); also see *Wietharn v. Safeway Stores, Inc.*, 16 Kan. App. 2d 188, 820 P.2d 719, rev. denied 250 Kan. 808 (1991).

⁹ *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997).

4. Respondent and its insurance carrier contend that Dr. Mills' January 27, 2000 medical report should not be included as part of the evidentiary record. The Board disagrees. First, the medical report should be considered pursuant to K.S.A. 1996 Supp. 44-510e, which provides in part:

. . . If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment **which shall be considered** by the administrative law judge in making the final determination. . . . (Emphasis added.)

Further, Dr. Mills' medical report should be considered pursuant to K.S.A. 44-516, as amended by the 2000 Legislature. That statute now reads:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. **The report of any such health care provider shall be considered by the administrative law judge in making the final determination.** (Emphasis added.)

The Board is mindful that K.S.A. 44-516 was amended by the 2000 Legislature to provide that the report from the neutral health care provider shall be considered by the administrative law judge. But the amendment is procedural as it relates to the admissibility of evidence and does not change the substantive rights or obligations of the parties. Therefore, the amendment applies retroactively to this claim.

5. At the time of regular hearing, claimant continued to work for respondent for wages that were sufficient to disqualify him from receiving a work disability (a disability greater than the functional impairment rating). Therefore, claimant's permanent partial general disability should be based upon his 19 percent whole body functional impairment rating.¹⁰

6. The Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

¹⁰ K.S.A. 1996 Supp. 44-510e(a).

AWARD

WHEREFORE, the Board affirms the July 14, 2000 Award entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of August 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Richard Sanborn, Wichita, KS
Clifford K. Stubbs, Lenexa, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director